CIMB Bank Bhd v Tan Hua Peng @ Tan Kwah Peng

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–1357 OF 2009
LEE SWEE SENG JC
5 DECEMBER 2011

Banking — Banks and banking business — Loan agreement — Breach of terms of loan agreement — Failure to repay loan — Whether bank's claim time barred — Whether bank's employees had coaxed borrower into applying for the loan — Whether bank not entitled to claim for interest or to capitalise interest — Whether amount stated as owing by the bank was wrong — Conclusiveness of certificate of indebtedness — Whether bank failed to conduct proper due diligence vetting prior to granting the loan — Whether claim barred by laches — Whether bank failed to mitigate its loss

Contract — Coercion — Whether proven — Bank's employees coaxing borrower into applying for loan — Whether amounted to coercion

Limitation — Claim for money secured by charge — Claim by bank against defaulting borrower — Whether claim time barred — Loan repayable upon demand — Whether cause of action accrued only upon issuance of demand — Limitation Act 1953 s 21(1)

The plaintiff's bank had, by a letter of offer dated 23 February 1991 offered, and the defendant had accepted, a term loan and an overdraft facility ('the facilities') secured by two charges over the defendant's property. Due to non-payment of the outstanding sums for the said facilities by the defendant, the plaintiff issued a letter of demand dated 4 June 2009 and demanded the defendant to settle the outstanding sums within 14 days from the date of demand. The defendant failed to settle the outstanding sums and hence the plaintiff terminated the facilities and filed this civil suit. The plaintiff applied for summary judgment. The defendant raised the following issues: (i) that the plaintiff's claim was time barred; (ii) that the plaintiff's employees had coaxed the defendant into applying the said facilities; (iii) that the plaintiff was not entitled to claim for interest and/or to capitalise the interest; (iv) that the amount stated as owing by the plaintiff was wrong; (v) that the plaintiff had not done a proper due diligence vetting on him prior to the granting of the facilities; (vi) defence of laches; and (vii) that the plaintiff failed to mitigate its loss.

Held, allowing the application:

(1) The plaintiff's claim against the defendant was for money secured by a

charge. The relevant provision was s 21(1) of the Limitation Act 1953. Clauses 1 and 3(a) in the first charge annexure for the term loan provided that the repayment was upon demand. The plaintiff's cause of action against the defendant accrued around 18 June 2009 after the defendant failed to remedy the breach set out in the letter of demand dated 4 June 2009 within 14 days from the date of the said demand. Prior to the demand and recall of the facilities, the cause of action had yet to accrue since the event of default had not occurred yet. The plaintiffs action was clearly within time as it was filed on 15 July 2009; *Tan Kong Min v Malaysian Nasional Insurance Sdn Bhd* [2006] 1 MLJ 601 referred (see para 8).

(2) There is no law requiring the bank to immediately declare the borrower in default when he had failed to service his instalment payments. The clauses of the charge annexure gave the plaintiff a right to demand payment upon default of payment but not an obligation. The fact that the bank gave him time to pay and correspondingly time to stay in the property charged to the bank was a benefit to the defendant. Time did not start to run against the bank until a demand was made and the facilities were terminated and recalled (see para 16).

(3) Coaxing is not coercion and persuasion is not prohibited in the way banks may want to market their financial products. The defendant having accepted the said facilities and executed the letter of offer and created the charges in favour of the bank on his own free will could not now be heard and indeed was estopped from raising the issue of being coaxed in taking the loan (see para 17).

(4) The right to claim interest is contractual. Both the letter of offer and the charge annexure provided for it. The defendant was bound by what he had signed and agreed upon contractually in both the said letter of offer and the second charges created; *United Overseas Bank (Malaysia) Bhd v Soon Kin Fah & Anor* [2001] MLJU 329 referred; *Arab Malaysian Finance Berhad v Sukma Villa Sdn Bhd & Ors* [2002] 1 CLJ 391 referred; *Serangoon Garden Estate Ltd 250 v Marian Chye* [1959] MLJ 113 referred (see para 23).

(5) If a serious challenge was to be mounted on the accuracy of the sum claimed, then the defendant must have descended to details and showing how it was wrong on material particulars. It was not sufficient to say that the sum claimed was wrong; *Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd* [2000] 2 MLJ 113 referred (see para 21).

(6) In an O 14 application, the plaintiff only needs to verify the facts on which the plaintiff's claim is based. The plaintiff had exhibited the certificate of indebtedness of the amounts claimed and in the absence of manifest error on the said certificate the certificate stood as conclusive

evidence in support of the plaintiff's claim; *Supreme Leasing Sdn Bhd v Dior Enterprises & Ors* [1990] 2 MLJ 36 referred; *Danaharta Urus Sdn Bhd v YM Tengku Reza Shah bin Tengku Chaidzir Shah* [2010] MLJU 115 referred (see para 32).

(7) The allegation of the bank being easy in lending to the defendant and in essence enticing and entrapping the defendant was neither here nor there unless the defendant raised the defence of undue influence or coercion or misrepresentation or fraud on the part of the bank (see para 45).

(8) An essential element of laches is the requirement that the party invoking the doctrine has changed its position as a result of the delay. However the defendant had not proved this. In fact the benefit he had enjoyed all these years was that he got to stay in his house without interruption or interference from the bank who was especially lenient on him where default was concerned (see para 52).

(9) In a claim by a bank against a borrower for amount outstanding from a loan given, there is hardly anything that a bank can do to mitigate its loss (see para 54).

(10) The defendant had not raised any triable issues that justified this matter going for full trial (see para 56).

[Bahasa Malaysia summary

Bank plaintif telah, melalui satu surat tawaran bertarikh 23 Februari 1991 menawarkan, dan defendan telah menerima, satu pinjaman berterma dan kemudahan overdraf ('kemudahan') yang dijamin oleh dua cagaran ke atas hartanah defendan. Disebabkan tiadanya pembayaran jumlah wang yang tertunggak bagi kemudahan tersebut oleh defendan, plaintif telah mengeluarkan surat tuntut bertarikh 4 Jun 2009 dan menuntut defendan untuk menyelesaikan jumlah wang yang tertunggak dalam tempoh 14 hari dari tarikh tuntutan. Defendan gagal menjelaskan jumlah yang tertunggak dan dengan itu plaintif menamatkan kemudahan dan memfailkan guaman sivil ini. Plaintif memohon untuk penghakiman ringkas. Defendan membangkitkan isu-isu berikut: (i) bahawa tuntutan plaintif telah terhalang oleh masa; (ii) bahawa pekerja plaintif telah memujuk defendan supaya menggunakan kemudahan tersebut; (iii) bahawa plaintif tidak berhak untuk menuntut faedah dan/atau untuk memanfaatkan kepentingan tersebut; (iv) bahawa jumlah yang dinyatakan sebagai terhutang oleh plaintif adalah salah; (v) bahawa plaintif tidak melakukan ketekunan wajar yang sesuai dalam menyemaknya sebelum pemberian kemudahan; (vi) pembelaan kelewatan; dan (vii) bahawa plaintif gagal untuk mengurangkan kerugian.

Diputuskan, membenarkan permohonan:

(1) Tuntutan plaintif terhadap defendan adalah untuk wang dicagarkan oleh

caj. Peruntukan yang berkenaan adalah s 21(1) Akta Had Masa 1953. Klausa 1 dan 3(a) dalam lampiran pertuduhan pertama bagi pinjaman berterma dengan syarat bahawa pembayaran balik adalah atas permintaan. Kausa tindakan plaintif terhadap defendan terakru sekitar 18 Jun 2009 setelah defendan gagal untuk meremedikan kemungkiran yang dinyatakan dalam surat tuntutan bertarikh 4 Jun 2009 dalam tempoh 14 hari dari tarikh permintaan tersebut. Sebelum permintaan dan penarikan balik kemudahan, kausa tindakan tersebut masih belum terakru kerana peristiwa kemungkiran belum lagi berlaku. Tindakan plaintif adalah jelas dalam masa kerana ia telah difailkan pada 15 Julai 2009; *Tan Kong Min v Malaysia National Insurance Sdn Bhd* [2006] 1 MLJ 601 dirujuk (lihat perenggan 8).

(2) Tiada undang-undang yang mengkehendaki agar bank serta-merta mengisytiharkan peminjam ingkar apabila dia gagal untuk membayar bayaran ansuran. Klausa-klausa lampiran pertuduhan memberikan plaintif hak untuk menuntut bayaran atas keingkaran membayar tetapi bukan satu kewajipan. Hakikat bahawa bank memberinya masa untuk membayar dan masa untuk tinggal di hartanah yang dicagarkan kepada bank adalah manfaat kepada defendan. Masa belum bermula bagi bank sehingga satu tuntutan telah dibuat dan kemudahan telah ditamatkan dan dipanggil semula (lihat perenggan 16).

(3) Pujukan bukan paksaan dan pujukan tidak dilarang di mana bank mungkin mahu memasarkan produk kewangan mereka. Defendan setelah menerima kemudahan tersebut dan surat tawaran dan setelah membuat cagaran memihak kepada bank atas kehendaknya sendiri, kini tidak boleh didengar lagi dan sesungguhnya telah diestop daripada membangkitkan isu dipujuk untuk mengambil pinjaman (lihat perenggan 17).

(4) Hak untuk menuntut kepentingan adalah kontraktual. Kedua-dua surat tawaran dan lampiran cagaran memperuntukkannya. Defendan terikat dengan apa yang telah ditandatangan dan dipersetujuinya secara kontraktual dalam kedua-dua surat tawaran tersebut dan cagaran yang kedua dibuat; *United Overseas Bank (Malaysia) Bhd v Soon Kin Fah & Anor* [2001] MLJU 329 dirujuk; *Arab Kewangan Malaysia Berhad v Sukma Villa Sdn Bhd & Ors* [2002] 1 CLJ 391 dirujuk; *Serangoon Garden Estate Ltd v Marian Chye* [1959] MLJ 113 dirujuk (lihat perenggan 23).

(5) Jika cabaran yang serius diukur pada ketepatan jumlah wang yang dituntut, maka defendan mestilah telah memberikan butir-butir dan menunjukkan bagaimana ia adalah salah secara material, dengan mendalam. Ia tidak mencukupi untuk mengatakan bahawa jumlah yang dituntut adalah salah; *Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd* [2000] 2 MLJ 113 dirujuk (lihat perenggan 21).

(6) Dalam sesuatu permohonan A 14, plaintif hanya perlu mengesahkan fakta-fakta yang menjadi asas tuntutan plaintif. Plaintif telah melampirkan sijil keterhutangan jumlah yang dituntut dan jika tiada kesilapan yang nyata dalam sijil tersebut, sijil tersebut kekal sebagai keterangan konklusif bagi menyokong tuntutan plaintif; *Supreme Leasing Sdn Bhd v Dior Enterprises & Ors* [1990] 2 MLJ 36 dirujuk; *Danaharta Urus Sdn Bhd v YM Tengku Reza Shah bin Tengku Chaidzir Shah* [2010] MLJU 115 dirujuk (lihat perenggan 32).

(7) Dakwaan bank bersikap mudah dalam memberi pinjaman kepada defendan dan pada asasnya menarik dan memerangkap defendan was neither here nor there melainkan jika defendan membangkitkan pembelaan pengaruh tidak wajar atau paksaan atau salah nyataan atau penipuan di pihak bank (lihat perenggan 45).

(8) Elemen penting kelewatan adalah keperluan pihak yang membangkitkan doktrin telah mengubah kedudukannya akibat kelewatan. Walau bagaimanapun defendan tidak membuktikan ini. Malah, manfaat yang dinikmatinya selama ini adalah bahawa dia berpeluang untuk tinggal di rumahnya tanpa gangguan atau campur tangan daripada bank yang khasnya longgar kepadanya di mana kemungkiran adalah berkenaan (lihat perenggan 52).

(9) Dalam tuntutan oleh bank terhadap peminjam bagi jumlah tertunggak daripada pinjaman yang diberikan, hampir tiada ada apa-apa yang boleh lakukan oleh bank untuk mengurangkan kerugian (lihat perenggan 54).

(10) Defendan tidak menimbulkan sebarang isu yang boleh dibicarakan yang mewajarkan perkara ini untuk diteruskan dengan perbicaraan penuh (lihat perenggan 56).]

Notes

For cases on coercion, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3527–3530.

For cases on limitation in general see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2074–2477.

For cases on loan agreement see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2322–2327.

Cases referred to

Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2000] 2 MLJ 417; [2000] 2 CLJ 457, CA (refd)

Affin Bank Bhd v Datuk Ahmad Zahid bin Hamidi [2005] 3 MLJ 361; [2005] 1 CLJ 521, HC (refd)

Arab Malaysian Finance Bhd v Sukma Villa Sdn Bhd & Ors [2002] 1 CLJ 391, HC (refd)

Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd [2000] 2 MLJ 113, HC (refd)

Bank Bumiputra Malaysia Bhd v Galian Saham Sdn Bhd & Ors [1990] 1 MLJ 185, HC (refd)
Cempaka Finance Bhd Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363, CA (refd)
CIMB Bank Bhd v Goh Tain Pak & Anor [2009] 1 LNS 1320, HC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
Danaharta Urus Sdn Bhd v YM Tengku Reza Shah bin Tengku Chaidzir Shah [2010] MLJU 115; [2010] 3 AMR 826, HC (refd)
Multi-Purpose Credit Sdn Bhd v Tan Sri Dato' Paduka (Dr) Ting Pek Khing [2006] 5 MLJ 589, HC (refd)
Oriental Bank Bhd v Jaafar Sidek b Mohd Salam & 2 Ors [1990] 2 CLJ (Rep) 585, HC (refd)
Serangoon Garden Estate Ltd v Marian Chye [1959] MLJ 113 (refd)
Supreme Leasing Sdn Bhd v Dior Enterprises & Ors [1990] 2 MLJ 36, HC (refd)
Tan Kong Min v Malaysian Nasional Insurance Sdn Bhd [2006] 1 MLJ 601, FC (refd)
United Overseas Bank (Malaysia) Bhd v Soon Kin Fah & Anor [2001] MLJU 329; [2001] 7 CLJ 54, HC (refd)

Legislation referred to

Limitation Act 1953 s 21(1)
National Land Code s 254
Rules of the High Court 1980 O 14

Chua Yeong Chien (Che Mokhtar & Ling) for the applicant/plaintiff.
Molly M Gomez (Molly M Gomez & Associates) for the respondent/defendant.

Lee Swee Seng JC:

PROLOGUE

[1] This is an application for summary judgment by the plaintiff bank against the defendant borrower for a loan taken by the borrower where he had defaulted. The Rules of the High Court 1980 ('RHC') allows for a summary procedure where through affidavit evidence alone, if it can be shown that the defendant has not been able to raise a triable issue that should justify the matter being set down for trial, then generally summary judgment is allowed to be entered against the defendant.

PROBLEM

[2] Bank Bumiputra Malaysia Bhd ('BBMB') had by its letter of offer dated 23 February 1991 offered and the defendant accepted a term loan of

RM103,485.74 and an overdraft facility of RM12,500 (together referred to as 'the facilities'). As security for the facilities two charges were created by the defendant over his property in favour of BBMB. Upon the completion of the loan documentation and the registration of the charge with the land office, BBMB released the term loan to the defendant and allowed the defendant to utilise the overdraft facility.

[3] The assets, liabilities and business of BBMB were vested in Bank of Commerce (M) Bhd (BOC) by a vesting order of 3 September 1999 and an amended vesting order of 25 October 1999. On 30 September 1999 BOC changed its name to Bumiputra-Commerce Bank Bhd and on 7 September 2006 it changed its name to CIMB Bank Bhd, the plaintiff in this suit.

[4] The defendant failed to service the monthly instalment of the term loan and/or failed to regularise the overdraft facility in a satisfactory manner. Due to the non-payment of the outstanding sums for the said facilities by the defendant, the plaintiff through its solicitors, issued a letter of demand dated 4 June 2009 and demanded the defendant to settle the outstanding sums of RM691,797.39 and RM72,523.22 as at 27 May 2009 within 14 days from the date of demand.

[5] The defendant failed, neglected or refused to settle the outstanding sums within the prescribed period and hence committed an event of default and breach. The plaintiff proceeded to recall and terminate the facilities of the defendant and filed this civil suit against the defendant 15 July 2009.

PRAYER

[6] The plaintiff pleaded in its amended statement of claim dated 7 April 2011 that as at 27 May 2009, the total outstanding sums due from and owing by the defendant for the term loan is RM431,197.51 and the overdraft facility is RM46,043.13 together with interest thereon at the rate of 1.25%pa above the plaintiff's base lending rate on a monthly rest from 28 May 2009 until realisation and costs.

[7] The plaintiff took out a summary judgment application under O 14 of the RHC in encl 20 claiming for the said sums and also exhibited the letter of demand dated 4 June 2009 and a certificate of indebtedness as exh P6 in the plaintiff's affidavit in support of the application as well as the relevant bank statements in exh P7.

PRINCIPLE

First issue: the plaintiff's claim is time barred

[8] The defendant contended that the plaintiff's claim is time barred. There

is absolutely no merit in this contention. The plaintiff's claim against the defendant is for money secured by a charge. The relevant provision is s 21(1) of the Limitation Act 1953. The Federal Court in *Tan Kong Min v Malaysian Nasional Insurance Sdn Bhd* [2006] 1 MLJ 601; [2005] 3 CLJ 825 at p 826 of the headnotes had explained the applicability of s 21 of the Limitation Act in this manner:

> On the facts, s 6 could not apply in view of the express exclusion of 'any action to recover money secured by any mortgage of or charge on land' in s 6(5)(b) of the Act. The action was thus founded on a claim on contract under s 6. The applicable provision was s 21. Section 21(1) specifically refers to an action to recover moneys secured by a charge which is an action in personam, whereas s 21(2) specifically refers to a foreclosure in respect of mortgaged personal property which is an action in rem. The limitation period was therefore 12 years from the date the right to receive the money accrued or 12 years from the date on which the right to foreclose accrued, respectively.

[9] Clauses 1 and 3(a) in the first charge annexure for the term loan provided that the repayment is upon demand. Clause 1(a) states as follows:

> The land … together with the building … erected thereon are charged to the Bank with the *repayment on demand* of the sum of RM103,485.74 only for the principal only lent to … the Chargor … together with interest AND *until demand is made* the Chargor shall pay the Loan with interest thereon by … 168 equal monthly instalments of … RM 1,076.62. (Emphasis added.)

[10] Clause 3(a) under 'Demands' provides as follows:

> In amplification and not in derogation of the provision of Clause 1 hereof it is hereby agreed that in the event of default being made by the Chargor in payment of any one or more of the Monthly instalment and other payments hereby agreed to be made at the time and in the manner herein mentioned … it is hereby mutually agreed that the *Bank shall be at liberty to demand immediate payment of the Loan* or the balance thereof remaining unpaid and interest thereon and all other sums payable under this Charge upon such demand being made all such money's shall become immediately payable. (Emphasis added.)

[11] Clause 12 on 'Notice to Remedy Breach' provides as follows:

> In the event of any breach by the Chargor(s) of any of the agreements covenants terms stipulations and undertakings herein provided and on the part of the Chargor(s) to be observed and performed (including the agreement or covenant *to pay for the sum for the time being owing to the Bank on demand* as aforesaid) occuring and continuing for a period of not less than seven (7) days it *shall be lawful* for the Bank forthwith to give notice to the Chargor under section 254 of the National Land Code requiring the Chargor to remedy the said breach within a period of not less than seven (7) days. (Emphasis added.)

[12] The Federal Court case above was followed in *CIMB Bank Bhd v Goh Tain Pak & Anor* [2009] 1 LNS 1320. A

[13] There are also the equivalent clauses in cll 1, 6 and 30 of the second charge annexure for the overdraft facility. B

[14] The plaintiff's cause of action against the defendant would accrue around 18 June 2009 after the defendant had failed to remedy the breach set out in the letter of demand dated 4 June 2009 within 14 days from the date of the said demand. Prior to the demand and recall of the facilities, the cause of action has yet to accrue since the event of default has not occurred yet. The plaintiff's action is clearly within time as it was filed on 15 July 2009. C

[15] The defendant's argument is that he defaulted on payment a few months after the term loan was released on 28 March 1991 and that the plaintiff filed the writ of summons against the defendant only on 15 July 2001 which by calculation is 220 months or 18 years and four months later when in fact the loan was to have been settled in 168 months. D

[16] There is no law requiring the bank to immediately declare the borrower in default when he had failed to service his instalment payments. Even the clauses referred to by the defendant ie cll 3(a), 3(b), 12 and 39 of the charge annexure gave the plaintiff a right to demand payment upon default of payment but not an obligation. The fact that the bank gave him time to pay and correspondingly time to stay in the property charged to the bank is a benefit to the defendant. Time does not start to run against the bank until a demand is made and the facilities are terminated and recalled. So long as the plaintiff bank had sued within 12 years of the expiry of the notice to remedy breach and demand for payment, the plaintiff is perfectly within the limitation period. E F G

Second issue: the plaintiff's employees had coaxed the defendant into applying the said facilities

[17] This is of course a most interesting argument raised by the defendant. However no one can have more power over us than that which we allow the person to have. The defendant is not pleading undue influence and coercion. Coaxing is not coercion and persuasion is not prohibited in the way banks may want to market their financial products. H I

[18] Learned counsel for the defendant said in her submission that the borrower was invited into the then BBMB Bank in Brickfields, Kuala Lumpur in late February 1991 by bank officers in a much publicised '5 Star Scheme' for

'advice and financial planning discussion'. The discussion went on for four hours during which time he was offered drinks, free key-chains and ball-pens. To cap it all he was given lunch by the bank manager along with some of the officers engaged in the said promotion. The defendant 'succumbed' to the temptation when in the words of his counsel in her submission:

> the Bank dangled the proverbial carrot in front of the Defendant ie an overdraft facility of RM12,500.00 in addition to the offer of a term loan of RM103,485.74. The Defendant was unable to resist the offer of the BBMB officers and succumbed to the offer under the '5 Star Scheme'.

[19] Graphic as the expression of counsel may be and aggressive as the marketing approach of the bank may be, it does not take away the personal responsibility of the borrower in making repayment of the facilities. The borrower is in fact telling the bank in its face that you tempted me with the loan and now you shall not take me to court much less take judgment against me because had you not offered me the loan I would not have been in this predicament! It is tantamount to a borrower blaming his financial problems on the bank for having tempted him with money! It is no different from some one who fell into the temptation to help himself to the company's money and when sued said that because money was freely available in the till and the boss was not keeping a watchful eye he could not resist the temptation!

[20] What is far more important is that there was no affidavit evidence of the defendant 'condescending upon particulars' in support of his assertions.

[21] As was held in *(Dr) Ting Pek Khing*[1] >*Multi-Purpose Credit Sdn Bhd v Tan Sri Dato' Paduka (Dr) Ting Pek Khing* [2006] 5 MLJ 589 at p 596:

> … The defendant's affidavits failed to 'condescend upon particulars' (per Lord Blackburn in *Wallingford v Mutual Society* (1880) 5 App Cas 685 at p 704 (HL)). Since the defendant has failed to produce any evidence to support his assertions, the defendant was deemed to have not 'condescended upon particulars' and this meant that those averments must be construed as mere bare denials and they should be rightly disregarded.

[22] I am in agreement with the plaintiff's counsel that the defendant having accepted the said facilities and executed the letter of offer and created the charges in favour of the bank on his own free will cannot now be heard and indeed is estopped from raising the issue of being coaxed in taking the loan. Even if assuming for a moment that that were true, he could easily, upon coming to his senses so to speak, quickly obtain a discharge of his property by either selling it and paying the bank the amount outstanding and extricate himself from the entrapment and not to mention, having afterwards to look for a roof above his head perhaps by renting a house to stay. The borrower cannot

after having enjoyed the benefit and blessing of a house even after his default, now asserts that the bank had enticed and entrapped him and caused him this excruciating episode in his life.

Third issue: that the plaintiff is not entitled to claim for interest and/or to capitalise the interest

[23] The rigth to claim interest is contractual. Both the letter of offer and the charge annexure provide for it. The relevant parts of the letter of offer read:

> Interest: Both the Facilities
>
> At 8.50% per annum OR 1.25% above BBMB Base Lending Rate which at present is 7.25% subject to review.
>
> Capitalisation of interest: Any non payment of interest as stipulated shall cause it to be capitalised and added to the principal sum and interest chargeable thereon shall be at the same rate as prescribed above.
>
> Penalty of interest: Any default in the repayment of interest/instalment after the due date and any facility which has been recalled by the Bank shall cause a penalty interest of not less than 1.0% p.a. (or any other rate as determined by the bank) over and above prevailing interest rate imposed for the number of days such repayments are overdue.

[24] There are also clauses for the calculation of interest and capitalisation of interest in cll 6(a) and 7 of the charge annexure for the term loan and cll 4 and 5 of the charge annexure for thr overdraft facility. His Lordship Ramly Ali JC (as he then was) in *United Overseas Bank (Malaysia) Bhd v Soon Kin Fah & Anor* [2001] MLJU 329; [2001] 7 CLJ 54 held at p 55:

> From the relevant documents, ie the charge documents and the letter of offer, which were signed and agreed upon by the defendants and the borrower, it is clear that the plaintiff can charge interest on the sum due under the facility.

[25] In *Arab Malaysian Finance Bhd v Sukma Villa Sdn Bhd & Ors* [2002] 1 CLJ 391 it was held as follows:

> The right of the plaintiff to charge margin interest and penalty interest was contractually provided for by cll 4.05(1) and 4.07(2) respectively of the agreement. Hence, the plaintiff had proven its contractual right to such interest. As cl 4.06 enable the plaintiff to vary the margin interest, the plaintiff was clearly entitled to increase the same from 1%–4% upon due notification to the defendants which was duly given and not challenged by the defendants.

[26] The defendant is bound by what he had signed and agreed upon

contractually in both the said letter of offer and the two charges created as was observed so succintly and sensibly in *Serangoon Garden Estate Ltd v Marian Chye* [1959] 1 MLJ 113:

> once the document comtaining contractual terms is signed, then in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

[27] One may well add, the party signing it is bound even if later he should feel that he should not have agreed and in fact by agreeing he was entering into more debts.

Fourth issue: that the amount stated as owing by the plaintiff is wrong

[28] The challenge thrown at the plaintiff by the defendant that the sum claimed as outstanding is incorrect must be considered in the context of a defence of bare denials filed by the defendant. As was observed in *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363:

> Denials in a defence do not constitute evidence. They are challenges to the other side to show proof … Their affidavits merely relied on the defence they pleaded, which consists of bare denials and points of law which they could not sustain.

[29] It is clear that if a serious challenge is to be mounted on the accuracy of the sum claimed, then the defendant must descend to details and showing how it is wrong on material particulars. It is not sufficient to say that the sum claimed is wrong. See the case of *Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd* [2000] 2 MLJ 113.

[30] The plaintiff admitted that after updating the accounts of the defendant, the plaintiff immediately proceeded to file an application to amend the outstanding sums to show the correct figure as at 27 May 2009 as RM431,197.51 for the term loan and RM46,043.13 for the overdraft together with interest until full settlement. The amendment dates back to the date of the writ and statement of claim and they are in themselves a demand on the defendant to pay.

[31] I agree with learned counsel for the plaintiff that in an O 14 application, the plaintiff only needs to verify the facts on which the plaintiff's claim is based as explained by His Lordship VC George J (as His Lordship then was) in *Supreme Leasing Sdn Bhd v Dior Enterprises & Ors* [1990] 2 MLJ 36:

Verification of the facts in the context of O 14 r 2 is not to be understood to mean proving the facts. The plaintiff has in effect swear to the truth of the facts on which the claim is based. It is sufficient to swear that the amount claimed is owed. It is the cause of action that has to be verified and not the results or consequences of the alleged cause of action …

[32] The plaintiff had also exhibited the certificate of indebtedness of the amounts claimed and in the absence of manifest error on the said certificate the certificate stands as conclusive evidence in support of the plaintiff'—s claim as provided for in cl 22 of the annexure to the first charge and cl 38 of the annexure to the second charge.

[33] In *Danaharta Urus Sdn Bhd v YM Tengku Reza Shah bin Tengku Chaidzir Shah* [2010] MLJU 115; [2010] 3 AMR 826 is was clarified and clearly stated as follows in the headnotes at pp 826–827:

(1) A conclusive evidence clause enables a party relying on it to produce statement of accounts to prove the quantum and correctness of the debt without resorting to an inquiry of the actual indebtedness upon ordinary legal evidence. On the facts and since the plaintiff had produced the statement of accounts, the defendant therefore is contractually precluded from requiring the plaintiff to prove the accuracy of the statement. However, the defendant is not precluded from adducuing evidence to show that there was manifest error on the accounts or fraud. It is only when there is evidence produced which casts doubt on the accuracy of the statement of accounts, that the court would not accept it as conclusive. Hence, the plaintiff had to prove the quantum of debt claimed.

(2) The onus was on the defendant to produce evidence of manifest error on the face of the statement of accounts …

[34] Learned counsel for the defendant referred to the case of *Oriental Bank Bhd v Jaafar Sidek b Mohd Salam & 2 Ors* [1990] 2 CLJ (Rep) 585 where Her Ladyship Siti Norma Yaakob J (as the former CJM then was) held at p 585 in the headnotes:

(1) The defendants, as guarantors, are entitled to know the true extent of the borrower's liability as their own liability is secondary to that of the principal borrower.

(2) The presence of a conclusive evidence clause per se, cannot prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them.

(3) As a result of the plaintiff's reluctance to disclose material facts, court decided to exercise its discretion to allow defendant's application for further and better particulars.

[35] That was a decision of the court's exercise of discretion for further and better particulars. Here there has been no such application and what is more is a defence consisting of a bare denial.

[36] Learned counsel for the defendant also referred me to the Court of Appeal case of *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417; [2000] 2 CLJ 457, where His Lordship Mohktar Sidin JCA held at p 458 of the headnotes:

> (2a) The facts disclosed lengthy affidavits and various exhibits filed by both parties and there was a serious conflict of material evidence which could only be resolved by subjecting the deponents to cross-examination and/or calling other witnesses whose evidence could only be evaluated by the court after seeing and hearing them.

[37] At pp 470–471 His Lordship observed:

> In a nutshell, in an application under O 14 made by the plaintiff for summary judgement without trial, the general principles established are that the plaintiff has to satisfy the court that the defendant plainly and obviously has no defendant to the plaintiff's claim or part of the plaintiff's claim. If the plaintiff is able to satisfy the court, then summary judgement should be entered in the plaintiff's favour. On the other hand, if the defendant can show that there is a serious conflict of material facts as disclosed in the opposing affidavits, or there is otherwise a triable issue worthy of judicial investigation in the trial of the action, or there is an important and difficult point of law requiring further and mature consideration at the trial, summary judgment should be refused.

[38] Whilst the principle set out cannot be disputed the application of the dicta to this case is misplaced as one wonders what further evidence may emerge by subjecting the deponent of the bank's affidavit to cross-examination. Where the case turns around on the accuracy of the figure claimed, all the plaintiff needs to show is the statements of account which the plaintiff had shown in exh P7 from January 1999 and April 1994 for the term loan and overdraft respectively until 27 May 2009.

[39] Lastly on this issue learned counsel for the defendant referred to the case of *Affin Bank Bhd v Datuk Ahmad Zahid Hamidi* [2005] 3 MLJ 361; [2005] 1 CLJ 521, where His Lordship Abdul Malik Ishak J (as he then was) held that at p 371 (MLJ); p 532 (CLJ):

> The defendant had challenged the certificate of indebtedness and so the plaintiff was duty bound to prove the same to court. This the plaintiff failed to do. It was also clear that the alleged indebtedness as set out in the certificate of indebtedness was inaccurate, manifestly erroneous and excessive. Final judgment therefore ought not to be accorded to the plaintiff.

[40] Further at p 373 (MLJ); pp 534–535 (CLJ) His Lordship observed:

> The plaintiff had breached its duty of care to the defendant. If the plaintiff had acted on the second collateral agreement and disposed of the shares on 22 August 2000, the amount outstanding today would only be traction of the claim. In fact, if there had been such a disposal the moneys obtained would have extinguished the defendants debt in principal to the plaintiff. Consequently, this was not as fit and proper case for summary judgment.

[41] Again I cannot agree more with the principles enunciated above but the case before us is not one where the certificate of indebtedness is inaccurate, manifestly erroneous and excessive.

[42] We remind ourselves of the Federal Court case of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 at p 284 where His Lordship Raja Azian Shah CJ (Malaya) (as His Royal Highness then was) stated with profound simplicity the effect of a certificate of indebtedness:

> We have often said in this court many a time that where the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar or the judge in chambers, or, for that matter, this court shall not deal with the whole matter under the RSC O 14 procedure. In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the of the actual indebtedness of the respondents … It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively be a certificate.

[43] His Lordship Steve Shim, former CJ (Sabah and Sarawak) in *Cempaka Finance Bhd Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 said:

> A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed.

Fifth issue: that the plaintiff had not done a proper due diligence vetting on him prior to the granting of the facilities

[44] The defendant is now saying that at the point when he was coaxed to take the facilities he was already not prompt in servicing his loan with MBSB then as such he was reluctant to refinance his house which he had charged to MBSB in 1985 as he could see no advantage in exchanging one loan for another. Learned counsel asked whether the plaintiff was being negligent in not doing a proper due diligence vetting prior to the approval of the term loan and

overdraft facilities. She said the plaintiff had failed to exercise due diligence and care in releasing the facilities without giving thought to the repayment capabilities of a financially crippled defendant.

[45] I can only say that if learned counsel is serious is pursuing this line of defence that the plaintiff had been negligent, then she should have put in a counterclaim and try to develop the law further. This allegation of the bank being easy in lending to the defendant and in essence enticing and entrapping the defendant is neither here nor there unless the defendant raised the defence of undue influence or coercion or misrepresentation or fraud on the part of the bank.

[46] Even if the plaintiff bank chooses to lend without doing a proper credit assessment of the defendant, it will only having difficulty, as it now has, in recovering from the defendant when he defaults as he now has.

[47] The defendant asserted that way back in 1991 his house was worth RM350,000. I would suppose with that the bank need not worry at all because the term loan was only RM103,485.74 and even should the borrower default, the forced sale value would be enough to cover the amount outstanding. The decision of the plaintiff could not be said to be foolhardy.

[48] The defendant said that he did inform the bank of the following and the bank still offered him the facilities:

(a) that he had been unemployed since 1990;

(b) that his savings were depleted and his family jewel leery were either sold or pawned;

(c) that he owed his friends and family to the tune of thousands of ringgit and worse still; and

(d) that he had been termed 'bad credit risk' by MBSB being not prompt with the repayments since becoming unemployed.

[49] Assuming all that were true, the defendant should be glad that he found in the plaintiff or the plaintiff found in him someone who really needed financial help and so extended an overdraft facility to him to ride through the tough days of being unemployed.

[50] Lending is basically on trust and if the bank should find him trustworthy and indeed honest in admitting his financial woes there is no breach of its duty towards the defendant in lending him the amount to allow him to discharge his charge to MBSB by paying RM103,485.74 to redeem his house with some breathing space in the overdraft facility. I can see why there

was any need on the part of the bank to do a due diligence on the defendant when the defendant had told the bank all that the bank needed to know!

Sixth issue: defence of laches

[51] The defendant contended that the plaintiff should be denied its claim because it is guilty of laches. Learned counsel for the defendant quoted a passage from the book *Procedure & Principles: 0 26A: 0 14 & 0 14A* where the learned author Nasser Hamid said at p 269:

> Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it could be practically unjust to give a remedy, either because the party has, bay his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse and delay are most material. But in every case, if an argument against relief which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which may affect either party and cause a balance of justice or injustice in taking the cause or the other, so far as relates to the remedy: *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 229, 239 (Privy Council).

[52] Learned counsel for the plaintiff rightly pointed out that an essential element of laches is the requirement that the party invoking the doctrine has changed its position as a result of the delay. In other words, the defendant is in a worse position now than at the time the claim should have been made. However the defendant had not proved this. All that the defendant is saying is that had the house been sold in 1991 it would have fetched about RM350,000 and the amount outstanding then would have been only about RM120,000 in the form of principal, interest and costs and all other charges leaving the defendant with a cash balance of about RM230,000 to reorganise his life! However what has been too easily forgotten is this: there was nothing preventing the defendant from selling his house then at the best negotiated with any prospective buyer as the bank had not declared him to be in default until 4 June 2009 when a letter of demand was issued to the defendant. He could have achieved the same if not better result on his own. What he failed to see was that he would have lost his house and perhaps would have to be contented with a smaller house. All the same there was nothing stopping him for doing that and he certainly cannot blame the bank for not proceeding immediately to foreclose on his house. In fact the benefit he had enjoyed all these years is that he got to stay in his house without interruption or interference from the bank who was especially lenient on him where default

was concerned. Having enjoyed the benefit of staying in his house though in default for many years, how can he now say that he is now in a worse position?

[53] Learned counsel for the defendant's reliance on *Bank Bumiputra Malaysia Bhd v Galian Saham Sdn Bhd* [1990] 1 MLJ 185 was also misplaced as the court was dealing with a duty care to sell the land before the expiry of the mining lease and there the action had been filed after the expiry of the lease.

Seventh issue: the plaintiff failed to mitigate its loss

[54] In a claim by a bank against a borrower for amount outstanding from a loan given, there is hardly anything that a bank can do to mitigate its loss. If the bank takes action too quickly upon default, the bank would be labelled as heartless and complaints would be made to Bank Negara Malaysia. If the bank takes too long to recover it might then be argued for the borrower that summary judgment shoul be denied because there is a need to show that it had acted with all due diligence in recovering the loan or that it might be guilty of laches.

[55] All that the bank is recovering is based on the calculation of interest contractually provided for besides the principal sum of fhe facilities granted. For such a claim there is hardly any room for arguing that the bank had failed to mitigate its loss. Were it not so it would have been near impossible for a bank to succeed in summary judgment against a borrower to recover the loan and interests as a borrower would then raise the failure of the bank to mitigate its loss and that would cause the matter to be unsuitable for summary disposal as evidence has to be led on the loss that could have been mitigated.

PRONOUNCEMENT

[56] Based on all the aforesaid, I found that the defendant had not raised any triable issues that justify this matter going for full trial where witnesses are called.

[57] This court also notes that after receiving the letter of demand, the defendant had made two proposals for settlement by his letter of 15 June 2010 to pay RM180,000 in full and final settlement where the plaintiff counterproposed via its letter of 23 September 2010. There was again another proposal from the defendant dated 29 April 2011 to remit the sum of RM200,000 being full and final settlement for the facilities but this was rejected by the plaintiff.

[58] In the circumstances I had allowed summary judgment for the amount claimed with interests and costs as prayed for in the application for summary judgment in encl 20.

Application allowed.

Reported by Kanesh Sundrum